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No. 84-1545

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In The

Supreme Court of the United States

October Term, 1984

The Miller-Wohl Company, Inc.,

Appellant,

v.

Commissioner of Labor and Industry,
State of Montana, and Tamara L. Buley,

Appellees

ON APPEAL FROM THE SUPREME COURT OF MONTANA

MOTION TO DISMISS

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MOTION TO DISMISS

Appellees, Commissioner of Labor and Industry and the State of Montana, hereafter collectively referred to as the State, move this Court, pursuant to Supreme Court Rule 16.1, to dismiss the appeal of the Miller-Wohl Company, Inc., for the reasons stated herein.

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JURISDICTION

Miller-Wohl relies on 28 USC 1257(2) to bring this appeal.

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STATEMENT OF ISSUES

Miller-Wohl presents two issues in its appeal. Whether the Montana Maternity Leave Act (MMLA) violates the equal protection clause of the fourteenth amendment of the U.S. Constitution and whether the MMLA violates and is preempted by the Civil Rights Act of 1964, as amended.

———o———

GROUNDS FOR DISMISSAL

Miller-Wohl's appeal should be dismissed because:

1. The Montana Supreme Court did not pass on whether the MMLA violates the equal protection clause of the fourteenth amendment, and
2. Miller-Wohl bases its appeal on facts not in the record.

STATEMENT OF THE CASE

On or about August 6, 1980, Tamara L. Buley, hereafter Buley, filed a complaint with the Montana Department of Labor and Industry alleging that her ex-employer Miller-Wohl violated the Montana Maternity Leave Act, 39-7-201, et seq., MCA[1], by terminating her employment due to her pregnancy and by refusing to grant her a reasonable leave of absence for her pregnancy. After being served with a Notice of Complaint and Adminstratve Hearing, Miller-Wohl filed a Petition for Declaratory Judgment in the U.S. District Court for the District of Montana, Great Falls Division, asking the court to find the MMLA a violation of equal protection and preempted by Titles VII and XI of the Federal Civil Rights Act of 1964. A temporary restraining order was issued on September 9, 1980 enjoining the Commissioner and his hearings examiner from holding a hearing on Buley's complaint. The restraining order expired on September 22, 1980. An administrative hearing was held on the complaint on October 1, 1980 and a finding made that Miller-Wohl had violated the MMLA. The Commissioner awarded Buley backpay and statutory penalties.

On June 8, 1981 the Federal District Court issued its order (515 F.Supp. 1264 (D. Mont., 1981)) on Miller-Wohl's petition finding that the MMLA was constitutional and not preempted by the Civil Rights Act. This order was vacated by the U.S. Court of Appeals, 9th Circuit (685 F.2d 1088 (9c. 1982)) due to lack of federal subject matter jurisdiction.

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[1]The MMLA has since been recodified at 49-2-310 and 311, MCA.

On June 3, 1983 the District Court of the Eighth Judical District of the State of Montana in and for the county of Cascade held oral arguments on Miller-Wohl's petition for judicial review of the Department's administrative order. On February 7, 1984 the state district court entered its order finding "that the MMLA is discriminatory, is a denial of equal protection of the law, is a protective and preferential statute favoring nondisabled pregnant employees to the discrimination of disabled nonpregnant employees and disabled male employees, it is preempted by Title VII and XI of the Federal Civil Rights Act."

The district court's order was appealed to the Montana Supreme Court by Buley and the State. On December 28, 1984 the Montana Supreme Court reversed the district court's order. The Montana Supreme Court's opinion concluded:

> "In accordance herewith, the judgment of the district court declaring MMLA invalid is hereby reversed: the order of the Commissioner awarding backpay and penalties to Tamara Buley is reinstated; this cause is remanded to the district court for such further proceedings as may be necessary in accordance with this opinion, and with directions to remand to the Commissioner."

Miller-Wohl filed a Notice of Appeal with the Montana Supreme Court on February 1, 1985. Its jurisdictional statement was filed with the U.S. Supreme Court on March 27, 1985 and served on the State on April 8, 1985.

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STATEMENT OF THE FACTS

Miller-Wohl operates approximately 280 women's clothing stores nationwide, includng four stores in Montana. Buley was hired as a salesperson to work in Miller-Wohl's Three Sisters clothing store in Great Falls, Montana on or about August 1, 1979. Buley determined she was pregnant on or about August 14, 1979. Shortly before this date, she began to experience "morning sickness" consisting of temporary nausea and dizziness. Buley experienced morning sickness on a number of occasions while at work. She was sent home several times because of her illness. Miller-Wohl knew that Buley was pregnant and knew that her illness was due to her pregnancy. On August 27, 1979 Buley was terminated because she was unable to adequately perform her duties due to her illness which in turn was caused by her pregnancy. Buley gave birth on April 4, 1980.

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SUPPORTING ARGUMENT

Miller-Wohl's Argument That The MMLA Violates The Equal Protection Clause Of The Fourteenth Amendment Of The U.S. Constitution Was Not Expressly Passed On By The Montana Supreme Court.

In its petition for judicial review filed with the state trial court, Miller-Wohl alleged that the MMLA violated both the United States and the Montana Constitutions. Montana's equal protection provision is found at article II, section 4 of its constitution. That section reads:

> "Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the State nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, political or religious ideas."

In *Montana Human Rights Division v. City of Billings*, — Mont. —, 639 P2d 1283 (1982), the Montana Supreme Court held that this section creates a compelling state interest in eradicating discrimination. In Montana, a statute that classifies on the basis of sex will be subjected to strict scrutiny. In contrast, this Court held in *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.ed. 2d 395 (1976) that:

> To withstand [federal] constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.
>
> 429 U.S. at 197

The trial court in the present case held simply that the MMLA "is a denial of equal protection of the law". In briefs and argument the State made clear to the Montana Supreme Court that the MMLA was being challenged pursuant to both the United States and the Montana Constitutions and that the state's constiution provided the tougher hurdle to overcome. In addition, the Montana Human Rights Commisison filed an Amicus Curiae brief on this specific issue.

In reversing the trial court's holding that the MMLA is invalid, the Montana Supreme Court found that the

MMLA was not a violation of equal protection. The Court does not state the basis for this finding. It must be presumed, however, that the Court considered and ruled on the Montana constitutional challenge and found that the MMLA met the strict scrutiny requirement of article II, section 4. The Montana Supreme Court is the final interpreter of Montana's constitution. Questions of Montana constitutional interpretation cannot be appealed to a higher authority. To interpret the Court's holding differently would leave important Montana constitutional issues unanswered. Supreme Court Rule 16.1(b) states:

> "The court will receive a motion to dismiss an appeal from a state court on the ground that . . . the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on."

To be reviewed by this Court, a federal question must not only be "raised" but must also be "passed on". The Montana Supreme Court's opinion in no way indicates that a federal question was "expressly passed on".

In *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 60 S.Ct. 670, — L. Ed. — (1940) in discussing the so-called "not pressed or passed on" rule this court stated:

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to refute. Apart from the reluctance with which every court should proceed to

> set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this court to state court's requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this court, where the constitutionality of a statute has been upheld in a state court, consistently refuses to consider any grounds of attack not raised or decided in that court. 309 U.S. at 434.

In *State Farm Mutual Automobile Insurance Company v. Duel,* 324 U.S. 154, 65 S.Ct. 573, — L. Ed. — (1945) this Court held, more directly to the point, "since the [state] Supreme Court did not pass on the question, we may not do so." 324 U.S. at 160.

In *Illinois v. Gates,* — U.S. —, 103 S.Ct. 2317, — L. Ed. 2d — (1983), this court considered but did not decide whether the "not pressed or passed upon" rule was jurisdictional or prudential. The State submits that the rule is jurisdictional as evidenced by this Court's own Rule 16.1. In addition, the present case is one where the "appropriate relationship" of this Court to state courts referred to in *McGoldrick* should be recognized and Miller-Wohl's appeal dismissed.

Miller-Wohl's Argument That The MMLA Is Preempted By The Civil Rights Act Is Based On Facts Not In Evidence.

Miller-Wohl bases its argument that the MMLA violated Title VII on the notion that, unlike the Civil Rights Act, the MMLA does not consider a pregnant woman's ability or inability to work. Miller-Wohl argues that the MMLA requires an employer to grant a reasonable maternity leave irregardless of whether the pregnant worker is

disabled. This same issue was raised before the Montana Supreme Court which dismissed the argument finding:

> "We reject Miller-Wohl's arguments on these points. Miller-Wohl is arguing on a statement of facts that are not before this court, and were not before the district court nor the Commissioner. We are not considering in this case a nondisabled pregnant employee. Tamara Buley was disabled by virtue of her pregnancy, and eventually was discharged for that disability." 692 P.2d at 1253-4.

Miller-Wohl is limited to the facts in the record. The company cannot claim that the MMLA grants benefits to nondisabled pregnant workers that go beyond the scope of the Civil Rights Act since in this case Buley was disabled. An opinion by this Court on this issue would be advisory.

In addition, Miller-Wohl claims that the MMLA requires an employer to grant preferential treatment to pregnant women employees. Such preferential treatment, the company claims, discriminates against Miller-Wohl's male employees in violation of the Civil Rights Act. The record, however, indicates that Miller-Wohl had no male employees in Montana. With no male employees there can be no discrimination and again, an opinion by this Court on this issue would be advisory. Miller-Wohl claims the MMLA violates the Civil Rights Act and has the burden of presenting evidence to support this defense. Buley, the Manager and Assistant Manager of the Great Falls store, all witnesses at the administrative hearing, are women. Other store employees were consistently referred to by the store manager as "the girls", "the other girls", or "the rest of the girls".

CONCLUSION

Miller-Wohl claims that the issues it raises are substantial and that unless this Court takes this appeal employers nationwide will be uncertain as to whether Title VII allows and/or requires the granting of maternity leave.

Miller-Wohl's plea ignores existing case law on this subject. In *Abraham v. Graphic Arts International Union,* 660 F.2d 811 (D.C. Cir., 1981), the Court found that the granting of adequate maternity leave is required by Title VII. Recently, the U.S. Court of Appeals, 9th Circuit upheld a California law similar to the MMLA in *California Federal Savings and Loan Assoc. v. Guerra,* Nos., 84-84-5843, 84-5844, 9c. April 16, 1985. Two U.S. courts of appeals and the only state supreme court to have considered the issues raised by Miller-Wohl are all in agreement. Statutes like the MMLA, do not violate the Civil Rights Act of 1964. Miller-Wohl, apparently, is simply unwilling to recognize the established case law in this area.

Respectfully submitted,

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APPENDIX

Following are excerpts from the Administrative Transcript of the hearing held by the Commissioner pursuant to Buley's complaint against Miller-Wohl. The hearing was held on October 1, 1980 in Great Falls, Montana.

Page 47, Lines 10 through 23.

PAUL J. VAN TRICHT [Hearing Examiner]: Would you like to call the next witness.

CHARLES FINE: Yes. Judy Zeman.

JUDY ZEMAN: Okay.

PAUL J. VAN TRICHT: Do you swear the testimony you're about to give is the truth, the whole truth and nothing but the truth?

JUDY ZEMAN: Yes.

CHARLES FINE: Would you state your name for the record please.

JUDY ZEMAN: Judy Zeman.

CHARLES FINE: And would you spell your last name Judy.

JUDY ZEMAN: Z E M A N.

CHARLES FINE: You were employed by the Miller-Wohl Company as the store manager of the Great Falls Three Sisters store. Is that correct?

JUDY ZEMAN: Yes.

Page 48, Lines 29 through 32, Page 49, Lines 1 through 14.

CHARLES FINE: When was Mrs. Buley hired?

JUDY ZEMAN: August 1, 1979.

CHARLES FINE: And who hired her?

JUDY ZEMAN: I did.

CHARLES FINE: When was she terminated?

JUDY ZEMAN: August 27 of 79.

CHARLES FINE: And who terminated?

JUDY ZEMAN: I did.

CHARLES FINE: Why was she terminated?

JUDY ZEMAN: Because she was not capable of doing the jobs assigned to her.

CHARLES FINE: By that what do you mean?

JUDY ZEMAN: In which she spent a great deal of time in the back room and in the bathroom. We had to cover her area for her with other girls in the store. Several mornings there were complaints from the departments she worked in that there was nothing straightened, nothing put back in the proper place they were supposed to be, and in general affect she was too ill to do the work.

Page 53, Lines 21 through 32, Page 54, Line 1.

CHARLES FINE: Did she continue working there the entire time?

JUDY ZEMAN: No, I move the girls around. We rotate departments quite often and she also worked the coats and dress department, children's department, and fitting room.

CHARLES FINE: Did she move stock?

JUDY ZEMAN: Very, no. In respect to unpacking merchandise and carrying the stock down, no. Other than that it was, the only stock . . .

CHARLES FINE: Why not?

JUDY ZEMAN: Because she didn't feel well and I wouldn't let her do it.

CHARLES FINE: Who was moving it.

JUDY ZEMAN: Mainly Cheryl and myself and the rest of the girls.